Supreme Court, U.S.
FILED
JAN 15 1997

No. 96-966

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

LEONARD C. MCNEMAR,

Petitioner,

v.

THE DISNEY STORE, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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DATED: January 15, 1997

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QUESTION PRESENTED

The sole question presented by Petitioner is whether the doctrine of judicial estoppel as applied in the case at bar violated his rights under the Due Process Clause of the Fourteenth Amendment and his right to a jury trial under the Seventh Amendment. This question was not raised in any of the proceedings below and was not addressed by the Court of Appeals.

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Leonard C. McNemar and Respondent The Disney Store, Inc. The Disney Store, Inc. is a wholly-owned subsidiary of Disney Enterprises, Inc., which in turn is a wholly-owned subsidiary of The Walt Disney Company, the shares of which are publicly traded.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals affirming the District Court's grant of summary judgment for Respondent The Disney Store, Inc. ("TDS"), on the basis that Petitioner Leonard C. McNemar ("McNemar") is judicially estopped from establishing a *prima facie* case under the Americans With Disabilities Act ("ADA"), is reported at 91 F.3d 610 (3d Cir. 1996), and is reproduced in the appendix attached to the petition, "Pet. App." at A. 1-32. The District Court's opinion, granting TDS summary judgment on that same issue, is

reported at 4 A.D. Cases 897 (E.D. Pa. 1995), can also be found at 1995 WL 390051, and is reproduced in Petitioner's appendix, Pet. App. at C. 1-18. The Court of Appeals' order denying Petitioner's rehearing petition is not reported and is reproduced in Petitioner's appendix, Pet. App. at B. 1.

STATUTES INVOLVED

Title I of the ADA, 42 U.S.C. § 12112(a), provides:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Title I of the ADA, 42 U.S.C. § 12111(8) provides:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

STATEMENT OF THE CASE

On the particular facts of this case, the District Court granted summary judgment, unanimously affirmed on appeal, because McNemar failed to establish a *prima facie* case of disability discrimination under Title I of the ADA. 42 U.S.C. § 12112(a). Now, attempting to induce this Court to grant his Petition, McNemar asserts as his sole basis for review an argument never raised below, either by him or several supporting *amici curiae,* namely a sweeping but wholly unfounded constitutional attack on the well-established doctrine of judicial estoppel.

Below, McNemar had the burden of proving the essential predicate to any ADA claim — that at all material times he was able to perform the essential functions of the job with or without accommodation.[1] *McDonald v. Commonwealth of Pennsylvania,* 62 F.3d 92, 96 (3d Cir. 1995); *Deluca v. Winer Indus., Inc.,* 53 F.3d 793, 797 (7th Cir. 1995); EEOC Tech. Assist. Manual § 52.1. To be protected by Title I of the ADA, a plaintiff must prove that he or she is a "qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of the job." *Id.* A person who is not able to work is not covered by the ADA, is not within the class protected by Congress, and has no right to seek relief in the courts. *See* H.R. Rep. No. 101-485 (III), 101st Cong. 2d Sess. 454, 458 (1990).

In the District Court, at the close of discovery, TDS moved for summary judgment on the grounds that, *inter alia,* McNemar had failed to establish he was such a "qualified person." The undisputed evidence of record[2] established that McNemar had repeatedly and consistently asserted under penalty of perjury (supported by sworn statements from physicians) to three governmental agencies that he was totally and permanently disabled and unable to work prior to his termination and at all times relevant to his claim under the ADA. At his deposition in this case, McNemar affirmed that his statements and certifications were accurate.

The District Court granted summary judgment for TDS on the basis that, in light of his series of unvarying admissions under oath, McNemar was judicially estopped from arguing that he was a qualified person with a disability able to perform the job. Applying traditional summary judgment standards and the controlling law of the Circuit to the particular facts of this case, the District Court concluded that McNemar had failed to meet his threshold burden of proof under the ADA.

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1. McNemar's counsel conceded in oral argument that accommodation is not an issue in this case. (A copy of pages 10-11 of the Transcript of Oral Argument is attached at Resp. App. A. 1-4).

2. The evidence presented to the District Court is fairly described in the Opinion of the Court of Appeals. (Pet. App. at 5-10). The facts set forth in footnote 1 of the Petition are inaccurate and unsupported by the record.

McNemar appealed from the District Court's judgment against him. The issue presented to, and addressed by, the Court of Appeals for the Third Circuit was whether, on the particular facts of this case, the District Court abused its discretion. Recognizing that the doctrine of judicial estoppel is factually driven, a unanimous three member panel of the Court of Appeals affirmed, stating:

> McNemar has represented to one federal agency and to the agencies of two different states that he was totally disabled and unable to work — while now, in claiming relief under the American Disabilities Act [sic], he states that he is 'a qualified person with a disability who, with or without reasonable accommodation, can perform the essential functions of a job' as contemplated by 42 U.S.C. Secs. 12111(8), 12112(a).

(Pet. App. at A. 14-15).[3] In these particular circumstances, the Court of Appeals held that McNemar was precluded from asserting the directly contrary position in this lawsuit.

REASONS FOR DENYING THE PETITION

There are three reasons for summarily denying the Petition: First, the constitutional arguments under the Fourteenth Amendment and Seventh Amendment to the Constitution were never raised or addressed in the proceedings below. Second, no court has ever held that the application of judicial estoppel violates the Fourteenth or Seventh Amendments. To the contrary, this Court has expressly rejected the theory on which the Petition is based. Third, there is no split in the circuits on the matters raised and addressed below. Every circuit

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3. As the Court determined, Social Security and state disability benefits are available to disabled persons who are truly *unable* to work (*i.e.*, perform any job in the national economy), while the ADA protects those who are *able* to work. If McNemar and his doctors told the truth and he was unable to work, then he was not a member of the protected class under the ADA. If, however, McNemar and his doctors lied in order to obtain disability benefits, then he is properly precluded from asserting the directly contrary position. To hold otherwise would be tantamount to judicial condonation of fraud.

court of appeals which has considered a similar matter has reached the same result as the Third Circuit did here.

Hence, there are no special or important reasons for granting review of this matter, as required by Rule 10 of this Court's Rules.

I. The Constitutional Question Presented In Support Of The Petition Was Not Raised Or Passed Upon Below.

The sole question presented here — McNemar's broadside attack on judicial estoppel — was never raised or passed upon any where in any of the proceedings below. (A copy of the issues presented to the Third Circuit for review from briefs filed by Petitioner and the *amici curiae* supporting him are reproduced at Resp. App. B. 1-8).

Absent exceptional circumstances, this Court will not exercise its certiorari jurisdiction on a question which was not presented in the proceedings below. *Holly Farms Corp. v. National Labor Relations Bd.,* 116 S. Ct. 1396, 1402 n.7 (1996)("Because we generally do not address arguments that were not the basis for the decision below . . . we decline to entertain Holly Farms' . . . argument")(citation omitted); *Matsushita Elec. Indus. Co. v. Epstein,* 116 S. Ct. 873, 880 n.5 (1996)("While it is true that a respondent may defend a judgment on alternative grounds, we generally do not address arguments that were not the basis for the decision below"); *Lawn v. United States,* 355 U.S. 339, 362-63 n.16 (1958)("Only in exceptional cases will this Court review a question not raised in the court below"). There are no exceptional circumstances here, and McNemar has not even argued that there are. The Petition should therefore be denied.

II. The Courts Below Did Not Violate Petitioner's Right To Due Process Or The Right To A Jury Trial.

McNemar's disagreement with the Third Circuit cannot be elevated to the constitutional level. The Court of Appeals applied the governing law in the Circuit to the particular facts of the case, within the framework of applicable summary judgment standards under Rule 56 of the Federal Rules of Civil

Procedure. McNemar was given a full and fair opportunity to develop facts and oppose the grant.

McNemar cannot conjure up a constitutional argument under either the Fourteenth Amendment[4] or the Seventh Amendment simply because he lost on summary judgment and disagrees with the result. *See Fidelity Deposit Co. v. United States,* 187 U.S. 315, 319-21 (1902)(summary judgment does not violate due process or right to trial by jury); *see also Galloway v. United States,* 319 U.S. 372, 388-93 (directed verdict does not violate right to trial by jury), *reh'g denied,* 320 U.S. 214 (1943). Indeed, this Court has previously rejected the very argument McNemar makes here, holding that the use of an equitable doctrine to preclude a claim does not amount to a deprivation of due process rights under the Fourteenth Amendment or the right to a jury trial under the Seventh Amendment. *See Kremer v. Chemical Constr. Corp.,* 456 U.S. 461, 478 (collateral estoppel may, consistent with Due Process Clause of Fourteenth Amendment, preclude employment discrimination claim under Title VII), *reh'g denied,* 458 U.S. 1133 (1982); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 333-37 (1979) (use of offensive collateral estoppel to preclude claim did not violate Seventh Amendment); *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 437 (1982)(not due process violation to preclude claim for failure to comply with procedural or evidentiary rule, including statue of limitation)(citing *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314-16 (1945)).

The application of judicial estoppel to the specific facts of this case was neither vague nor arbitrary. Judicial estoppel has been part of our jurisprudence for more than a hundred years, emanating from *Davis v. Wakelee,* 156 U.S. 680 (1895), in

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4. The Due Process Clause of the Fourteenth Amendment could not even apply here. The Fourteenth Amendment requires state action, and here there is none because actions by federal courts do not constitute state action. *See Omni Capital Int'l v. Rudolf Wolff & Co.,* 484 U.S. 97 (1987)(actions by federal court governed by Due Process Clause of Fifth Amendment, not Fourteenth Amendment); *see also Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429-30 (1982)(Fourteenth Amendment's protections apply to state action). The Fifth Amendment applies to alleged due process violations by the federal government, including federal courts. *See* U.S. Const. amend. V.

which this Court specifically recognized the principle that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contradictory position. . . ." *Id.* at 689; *see also Michels v. Olmstead,* 157 U.S. 198 (1895).

When McNemar filed his action, judicial estoppel was firmly entrenched, specifically articulated, and consistently applied in the Third Circuit. *See E.F. Operating Corp. v. American Buildings,* 993 F.2d 1046 (3d Cir.), *cert. denied,* 510 U.S. 868 (1993); *Fleck v. KDI Sylvan Pools, Inc.,* 981 F.2d 107 (3d Cir. 1992), *cert. denied,* 507 U.S. 1005 (1993); *Delgrosso v. Spang and Co.,* 903 F.2d 234 (3d Cir.), *cert. denied,* 498 U.S. 967 (1990); *Lewandowski v. National R.R. Passenger Corp.,* 882 F.2d 815 (3d Cir. 1989); *Oneida Motor Freight, Inc. v. United Jersey Bank,* 848 F.2d 414 (3d Cir.), *cert. denied,* 488 U.S. 967 (1988); *Scarano v. Central R.R. Co.,* 203 F.2d 510 (3d Cir. 1953). There is no basis to conclude that McNemar lacked notice or was denied the opportunity to be heard concerning the application of judicial estoppel to the particular facts of this case.[5] *See Richards v. Jefferson County,* 116 S. Ct. 1761, 1765-66 (1996) (due process requires notice and opportunity to be heard). Hence, there was no deprivation of McNemar's due process rights under the Fourteenth (or Fifth) Amendment or his right to a jury trial under the Seventh Amendment.

III. There Is No Split Among The Circuits On The Issue Presented To The Court Of Appeals.

Without citing a single Court of Appeals case, McNemar would have this Court believe that the Circuits are split on the

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5. During the pendency of the appeal, the Third Circuit issued its decision in *Ryan Operations A.P. v. Santram-Midwest Lumber Company,* 81 F.3d 355 (3d Cir. 1996). There, the court articulated the following two-part test for the application of judicial estoppel: (1) Is the party's present position inconsistent with a position formerly asserted? (2) If so, did the party assert either or both of the inconsistent positions in bad faith — *i.e.,* with the intent to "play fast and loose" with the court? *Id.* at 361. Both parties were asked by the Court of Appeals to submit supplemental briefs addressing the impact of this decision on the issues in this case and did so.

matter raised by his lawsuit. This is simply untrue. Every circuit court faced with the same or similar issue has ruled in the same way as the Third Circuit did here. *See, e.g., Parker v. Metropolitan Life Ins. Co.*, 99 F.3d 181 (6th Cir. 1996) (plaintiff precluded from bringing ADA claim on basis of previous statements in disability benefits application); *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996)(plaintiff precluded from bringing ADA claim based upon statements in Social Security disability benefits application); *Simo v. Home Health & Hospice Care*, 1995 WL 674489 (1st Cir. Nov. 14, 1995) (affirming district court's preclusion of plaintiff's ADA claim on basis of previous certifications in Social Security benefits application); *DeGuiseppe v. Village of Bellwood*, 68 F.3d 187 (7th Cir. 1995) (plaintiff precluded from bringing § 1983 claim because of prior testimony at pension board hearing that unable to work); *August v. Offices Unlimited*, 981 F.2d 576 (1st Cir. 1992) (plaintiff precluded from bringing action under state anti-discrimination law because of statements in disability benefits application); *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987) (plaintiff precluded from bringing Rehabilitation Act claim because of certifications in disability benefits application), *cert. denied*, 485 U.S. 938 (1988); *see also Rissetto v. Plumbers and Steamfitters Local 353*, 94 F.3d 597 (9th Cir. 1996) (applying judicial estoppel to preclude plaintiff from asserting *prima facie* case under Age Discrimination in Employment Act). McNemar has not cited any conflicting circuit court decision.

The overwhelming majority of district courts in circuits other than the Third Circuit have also applied judicial estoppel in similar factual circumstances.[6] McNemar cites only one

6. *See* Second Circuit: *Simon v. Safelite Glass Corp.*, 943 F. Supp. 261 (E.D.N.Y. 1996); Fourth Circuit: *Hindman v. Greenville Hosp. Syst.*, 1996 WL 697739 (D.S.C. Nov. 20, 1996); Fifth Circuit: *Harris v. Marathon Oil Co.*, 1996 WL 726418 (W.D. Tex. Feb. 14, 1996); Sixth Circuit: *Griffith v. Wal-Mart Stores, Inc.*, 930 F. Supp. 1167 (E.D. Ky. 1996); Seventh Circuit: *Bollenbacher v. Helena Chem. Co.*, 934 F. Supp. 1015 (N.D. Ind. 1996); Eighth Circuit: *Johnson v. U.S. Steel Corp.*, 943 F. Supp. 1108 (D. Minn. 1996); Ninth Circuit: *Miller v. U.S. Bancorp*, 926 F. Supp. 994 (D. Ore. 1996); Tenth Circuit: *Cline v. Western Horseman, Inc.*, 922 F. Supp. 442 (D. Colo. 1996);

case — a district court decision in the Eleventh Circuit — where a court has specifically eschewed application of judicial estoppel on facts similar to those presented here, *Dockery v. North Shore Medical Center,* 909 F. Supp. 1550 (S.D. Fla. 1995). But, as McNemar acknowledges in his Petition, the Eleventh Circuit Court of Appeals has not itself addressed the issue of whether judicial estoppel would apply in these circumstances. Other district courts in the Eleventh Circuit, however, contrary to *Dockery,* have directly applied judicial estoppel in similar cases. *See, e.g., Taylor v. Food World, Inc.,* 1996 WL 705952 (N.D. Ala. Dec 5, 1996); *Fussell v. Georgia Ports Auth.,* 906 F. Supp. 1561 (S.D. Ga. 1995). Moreover, even the *Dockery* decision is consistent with the case at bar in that the district court *granted* summary judgment for the employer because the uncontradicted evidence of record, including admissions in plaintiff's benefits applications, established that she was unable to work at the relevant time and, therefore, could not establish a *prima facie* case under the ADA.

McNemar's argument that there are differences in the circuits on the precise contours of the doctrine of judicial estoppel is insufficient and unavailing. It is at best merely speculative to assert, as he does, that these variations would produce conflicting results on the particular facts of the present case. To the contrary, courts are likely to reach the same result even in those circuits where the doctrine is not applied.[7] Moreover, it is recognized in every circuit that a party cannot create a

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Smith v. Midland Brake, Inc., 911 F. Supp. 1351 (D. Kan. 1995); Eleventh Circuit: *Taylor v. Food World, Inc.,* 1996 WL 705952 (N.D. Ala. Dec 5, 1996); *Fussell v. Georgia Ports Auth.,* 906 F. Supp. 1561 (S.D. Ga. 1995).

7. The only circuits which do not recognize the doctrine are the Tenth Circuit and the District of Columbia Circuit. *See Chrysler Credit Corp. v. Country Chrysler, Inc.,* 928 F.2d 1509 (10th Cir. 1991); *Konstantinidis v. Chen,* 626 F.2d 933 (D.C. Cir. 1980). However, in these circuits district courts have applied the law of estoppel in circumstances similar to those presented here. *See, e.g., Cline v. Western Horseman, Inc.,* 922 F. Supp. 442 (D. Colo. 1996); *Smith v. Midland Brake, Inc.,* 911 F. Supp. 1351 (D. Kan. 1995); *Nguyen v. IBF, Inc.,* 905 F. Supp. 1471 (D. Kan. 1995); *Garcia-Paz v. Swift Textiles, Inc.,* 873 F. Supp. 547 (D. Kan. 1995).

genuine issue of material fact under Rule 56 by contradicting, without satisfactory explanation, his or her own prior sworn statements.[8]

In sum, there is no conflict and no basis for the exercise of certiorari review.

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8. *See Pyramid Securities, Ltd. v. I.B. Resolution, Inc.*, 924 F.2d 1114 (D.C. Cir.), *cert. denied*, 502 U.S. 822 (1991); *Franks v. Nimmo*, 796 F.2d 1230 (10th Cir. 1986); *see also Bank of Illinois v. Allied Signal Safety Restraint Syst.*, 75 F.3d 1162 (7th Cir. 1996); *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1 (1st Cir. 1994); *Sinskey v. Pharmacia Ophthalmics, Inc.*, 982 F.2d 494 (Fed. Cir. 1992), *cert. denied*, 508 U.S. 912 (1993); *Kennedy v. Allied Mutual Ins. Co.*, 952 F.2d 262 (9th Cir. 1991); *Hackman v. Valley Fair*, 932 F.2d 239 (3d Cir. 1991); *Rohrbough v. Wyeth Labs, Inc.*, 916 F.2d 970 (4th Cir. 1990); *Farrell v. Automobile Club of Michigan*, 870 F.2d 1129 (6th Cir. 1989); *Mack v. United States*, 814 F.2d 120 (2d Cir. 1987); *Albertson v. T.J. Stevenson & Co., Inc.*, 749 F.2d 223 (5th Cir. 1984); *Van T. Junkins and Assoc., Inc. v. U.S. Industries, Inc.*, 736 F.2d 656 (11th Cir. 1984).

CONCLUSION

Passion and emotion cannot supply the basis McNemar's Petition lacks. The decision affirmed below was made upon a fact-specific inquiry, and the law was properly applied. Petitioner's belated constitutional and conflict arguments are inappropriate and incorrect, and his Petition should be denied.

Respectfully submitted,

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RESPONDENT'S APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LEONARD C. McNEMAR, *Appellant,*	:	
vs.	:	No. 95-1590
THE DISNEY STORE, INC., *Appellee.*	:	

Oral Argument held in the above-captioned matter on Tuesday, June 11, 1996, at the United States Courthouse, The Albert Branson Maris Courtroom, 601 Market Street, Philadelphia, Pennsylvania, transcribed stenographically from an audiotape recording by Dennis Corsi, Registered Professional Reporter.

BEFORE:

RUGGERO J. ALDISERT, Senior Circuit Judge
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MORTON I. GREENBERG, Circuit Judge

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Counsel for EEOC

December 2nd. I want to take this –

MR. EPSTEIN: They're all December 2nd.

THE COURT: See, it's hard for me. You're much brighter than I. It's difficult for me to follow, you know, your sophisticated argument, counsel. You'll have to bear with me. Okay?

I want to know where in the record he notified the Social Security Administration that, having said he was disabled, that he was no longer disabled.

MR. EPSTEIN: He did so in the initial applications, Your Honor, on pages A-174 through 177 in his SSI application and A-985 through 988 in his SSDI application.

THE COURT: You know what I couldn't understand; what all the discussion in the briefs about reasonable accommodations have to do with this case because it doesn't seem to me to have anything to do with it because this is not a case over an argument of whether there was accommodations.

MR. EPSTEIN: No, sir. He always was able to work. He was able to work on the day that they fired him.

THE COURT: So he didn't need reasonable accommodations?

MR. EPSTEIN: He needed no accommodations, sir.

THE COURT: That clears that up for me. The other question: I'm not clear from the record, and maybe it's not in here and maybe it doesn't matter, he did apply for New Jersey disability payments, and he applied for relief from a loan obligation in Pennsylvania for education. Does the record tell us whether he received those benefits?

MR. EPSTEIN: He received those benefits, Your Honor.

THE COURT: He did receive them. And he's still on Social Security now; is that right?

MR. EPSTEIN: He's presently on Social Security. The record also reflects that he has continued to seek employment without success.

THE COURT: He had to be capable of doing this job on the day they fired him, I presume, and you don't say, and we're not involved then with whether he could do it with reasonable accommodations. He could do it straight out.

MR. EPSTEIN: Absolutely, and was doing

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1590

LEONARD C. MCNEMAR,

Appellant,

v.

THE DISNEY STORES, INC.,

Appellee.

(On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
Civil Action No. 94-6997)

BRIEF OF APPELLANT

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DATED: December 5, 1995

STATEMENT OF THE ISSUES

1. Did the district court err by applying the doctrine of judicial estoppel to foreclose an employee with AIDS from protection under the Americans with Disabilities Act, the New Jersey Law Against Discrimination, and the Employee Retirement Income Security Act because he had applied for and was awarded disability benefits following the discriminatory termination of his employment on the basis of his disability?

2. Did the district court err in dismissing an employee's claim for invasion of privacy as a matter of law where the employer confronted the employee, after hearing rumors that he had AIDS, questioned him on his health status, and disclosed to others, without his consent, that he had AIDS?

3. Did the district court err in dismissing an employee's claim for intentional infliction of emotional distress as a matter of law where his employer falsely accused him of theft so that it could fire him, eliminate its medical benefit obligations to him, and avoid public reaction to having a manager with AIDS working at a high profile Disney store?

No. 95-1590

United States Court of Appeals
for the
Third Circuit

LEONARD C. MCNEMAR,
Plaintiff-Appellant,

v.

THE DISNEY STORES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF AMICUS CURIAE OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF THE ISSUE

Did the district court err by applying the doctrine of judicial estoppel to foreclose an employee with AIDS from suing under the Americans With Disabilities Act because he had applied for and was awarded disability benefits following the discriminatory termination of his employment on the basis of his disability?[2]

2. There are other issues on appeal which this brief does not address.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-1590

LEONARD C. MCNEMAR,

Appellant,

v.

THE DISNEY STORES, INC.,

Appellee.

(On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
Civil Action No. 94-6997)

BRIEF OF *AMICUS CURIAE* NEW JERSEY EMPLOYMENT LAWYERS' ASSOCIATION

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DATED: January 8, 1996

STATEMENT OF THE ISSUES

Did the District Court err in applying the doctrine of judicial estoppel, at the summary judgment stage, to bar, as a matter of law, a plaintiff's claim of handicap discrimination under the NJLAD when the courts of New Jersey have rejected the use of this doctrine in similar situations and where substantial evidence existed in the record from which a reasonable jury could have found that the plaintiff was able to continue working?

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1590

LEONARD C. MCNEMAR,

v.

THE DISNEY STORES, INC.

Leonard C. McNemar,
Appellant.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT

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STATEMENT OF THE ISSUE

Whether the district court erred in ruling that the plaintiff's representation, in a post-termination benefits application, that he was "totally and permanently disabled" provided an absolute defense to the plaintiff's claim of unlawful discharge under the ADA.